

DISTRICT OF MAINE

Docket No. 00-19-P-C

demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following material facts are appropriately presented in the parties' statements of material facts. The plaintiff issued to the defendants a commercial marine insurance policy, number CHA 0046918-10, covering the period from November 24, 1998 to November 24, 1999. Statement of Material Facts ("Plaintiff's SMF") (Docket No. 17) ¶ 1; Defendants' Opposing Statements of Material Facts ("Defendants' Responsive SMF") (Docket No. 23) ¶ 1. The policy provided commercial marine hull coverage on the vessel ALLIED RESOURCE. *Id.* On or about October 24, 1999 the ALLIED RESOURCE sank near Mark Island in Penobscot Bay, Maine, in approximately 210 feet of water. *Id.* ¶ 2. Defendant Allied Marine owned the ALLIED RESOURCE; defendant Cranson is the sole member of Allied Marine. Defendants' Supplemental Statement of Material Facts ("Defendants' SMF") (included in Docket No. 23) ¶ 1; Plaintiff's Reply Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 34) ¶ 1.

Wil Gagnon, then a senior marine surveyor for the plaintiff, was notified of the sinking of the ALLIED RESOURCE on October 25, 1999. Plaintiff's SMF ¶¶ 3-4; Defendants' Responsive SMF ¶¶ 3-4. Gagnon has worked as a marine insurance adjuster since 1972 and has personally organized over two hundred vessel salvage operations. *Id.* ¶ 3. On Monday, October 26, 1999, Gagnon contacted defendant Michael Cranson and proposed that they hire a vessel and start searching for the ALLIED RESOURCE the next day. *Id.* ¶ 4. Cranson agreed. *Id.* On October 27, 1999 Gagnon cautioned Cranson that any salvage efforts by Acadia should not be construed as an affirmation of coverage, since no determination of coverage had been made. *Id.* ¶ 6. On October 26 or 27, 1999 Gagnon went out with Cranson and Charles Weidman, who had been operating the ALLIED RESOURCE when it sank, to search for the vessel. *Id.* ¶ 7. They were unable to make much progress that day due to problems with the hired boat and rough seas, among other factors. *Id.*

The second day of the search, they hired a different vessel and located the ALLIED RESOURCE. *Id.* ¶ 8. The plaintiff paid for both vessels used in the search. *Id.* ¶ 9. Weidman had procured an underwater video camera to assist in the search, and the plaintiff paid him \$400 for one day's use of the camera. *Id.* ¶ 10. Cranson procured an anchor, rope and buoy to mark the site. Defendants' SMF ¶ 8; Plaintiff's Responsive SMF ¶ 8. Prock Marine was contacted and indicated that it would be available to engage in the salvage of the ALLIED RESOURCE and could supply a barge, crane, and related equipment; however, it advised that it only had a few days in which to perform the work due to a previous commitment at the Portsmouth Naval Shipyard. Plaintiff's SMF ¶ 11; Defendants' Responsive SMF ¶ 11. Prock recommended that the plaintiff engage Ocean Access, Inc. ("Ocean Access") of Portsmouth, New Hampshire, as divers because of its reputation as being particularly experienced and skilled in deep-sea dives. *Id.* ¶ 12. The need to raise the vessel in three stages was discussed. *Id.*

The plaintiff contacted Ocean Access and was told that its divers were available but that they required at least one day's notice when the plaintiff was ready to start the salvage operation. *Id.* ¶ 14.

Ocean Access also required a decompression chamber. *Id.* ¶ 15. The plaintiff ordered the decompression chamber, which arrived on November 2, 1999. *Id.* Gagnon contacted other divers who were closer to Penobscot Bay but none of the divers he contacted indicated that they could do the job. *Id.* ¶ 18. Cranson arranged to procure a lifting bridle and hooks to lift the vessel and researched required cable strengths and other issues. Defendants' SMF ¶ 23; Plaintiff's Responsive SMF ¶ 23.

The plaintiff also contacted Maine Maritime Academy to determine the availability of a side-scan sonar and tow vessel, and was informed that both were available. Plaintiff's SMF ¶ 16; Defendants' Responsive SMF ¶ 16. The divers did not start their operations before Prock Marine departed for the Portsmouth Naval Shipyard. *Id.* ¶¶ 17, 19. After Prock left, Gagnon contacted Todd Marine Construction, Inc. of Scarborough, Maine, about the possibility of replacing Prock. *Id.* ¶ 19. Frustrated by continuing delays due to adverse weather conditions, Gagnon proposed to the plaintiff on November 10, 1999 that it bring in the divers from Ocean Access, along with other necessary equipment, to stand by for up to a week in Rockland, Maine. *Id.* ¶ 20. On or about November 11, 1999 the plaintiff's director of marine operations noted his agreement with this proposal. *Id.* ¶ 21. Soon thereafter the plaintiff received a letter dated November 11, 1999 from Cranson. *Id.* ¶ 22; Exh. D to Affidavit of Wil Gagnon (Docket No. 18). No one from the plaintiff ever discussed with Cranson the concerns he raised in this letter. Defendants' SMF ¶¶ 32-33; Defendant's Responsive SMF ¶¶ 32-33.

After considering the concerns raised in Cranson's letter and the continued adverse weather conditions, the plaintiff concluded that it would probably be counterproductive to continue the salvage effort. Plaintiff's SMF ¶ 24; Defendants' Responsive SMF ¶ 24. In addition, the plaintiff had become

increasingly persuaded that this might not be a covered loss. *Id.* On November 18, 1999 the plaintiff wrote to the defendants, reserving its rights and specifically advising them to “act as a prudent uninsured” and to take whatever steps might be necessary “to properly preserve and protect the vessel in her current condition and location.” *Id.* ¶ 25. On or about the same date, the plaintiff had the decompression chamber shipped back to the lessor and so advised Cranson, who did not object. *Id.* ¶ 26.

The plaintiff filed this action, in which it seeks a declaratory judgment that the policy it issued to the defendants is void or, in the alternative, that it has no obligation to the defendants under the policy, Amended Complaint for Declaratory Judgment, etc. (Docket No. 2) ¶6, on January 12, 2000. Docket.

III. Discussion

Presently at issue is count IV of the defendants’ counterclaim, which alleges negligence in connection with the plaintiff’s salvage efforts. Amended Answer, Affirmative Defenses and Counterclaims (Docket No. 5) at 8. Specifically, the defendants allege that the plaintiff “assumed responsibility for salvaging the Vessel,” that its efforts to effect the salvage were negligent and that its efforts resulted in damage to the ALLIED RESOURCE. *Id.* As relief, the count demands a declaration that the plaintiff is “estopped from denying coverage” and an award of unspecified damages. *Id.* Estoppel in the context presented by this case is an affirmative defense, *Reliance Ins. Co. v. Yacht ESCAPADE*, 280 F.2d 482, 486-90 (5th Cir. 1960); *see generally Cardillo v. Zyla*, 486 F.2d 473, 475 n.1 (1st Cir. 1973); it is not among the relief available for negligence claims in admiralty or common law. The defendants have alleged an estoppel claim in Count III of their counterclaim. Amended Answer, etc. at 7-8.

Generally, a salvor is liable for an unsuccessful salvage only when there is a finding of gross negligence or wilful misconduct. *Chesapeake Bay Bridge & Tunnel Dist. v. Oil Screw PRINCE*, 298 F. Supp. 881, 885 (E.D.Va. 1968). None of the factual allegations in the defendants' statement of material facts would support such a finding, and the defendants do not characterize the plaintiff's conduct in those terms in their opposition to the motion for summary judgment. Recovery is allowed against a salvor when a distinguishable injury to the salvaged property has resulted from the negligence of persons undertaking a salvage service. *Oil Screw NOAH'S ARK v. Bentley & Felton Corp.*, 292 F.2d 437, 441 (5th Cir. 1961). Here, no distinguishable injury was caused to the ALLIED RESOURCE by salvage operations; for all that appears in the summary judgment record, no salvage operation has taken place.

The defendants contend that case law concerning salvors is inapposite. Opposition to Acadia's Motion for Summary Judgment on Count IV of Counterclaim, etc. ("Defendants' Opposition") (Docket No. 22) at 1. While never actually taking the position that the plaintiff was not a salvor under the circumstances of this case, *id.* at 8, the defendants contend that the plaintiff injured them by not proceeding with a salvage effort after spending three weeks "directing" the preparations for such an effort, *id.* at 1. In order to proceed on their negligence claim, the defendants must first identify a duty running from the plaintiff to them that was breached. *Martinez v. Puerto Rico Marine Management, Inc.*, 755 F. Supp. 1001, 1006 (S.D.Ala. 1990) (admiralty); *Decker v. New England Pub. Warehouse, Inc.*, 749 A.2d 762, 765 (Me. 2000) (common law). The defendants contend, without citation to authority, that the duty in this case arose when the plaintiff undertook the salvage and that it was a duty "to conduct its activities with professionalism and due care." Defendants' Opposition at 6.

If the plaintiff was indeed acting as a salvor from the moment Gagnon appeared on the scene, or at any time before it decided not to continue, the case law cited by the parties supports the conclusion that it has no independent liability to the defendants for negligence. The plaintiff's salvage effort, if such it was, was unsuccessful; it caused no distinguishable injury to the vessel. *Sands v. One Unnamed 23' Seacraft, Pleasure Vessel*, 959 F. Supp. 1488, 1494 (M.D.Fla. 1997); *Oxman v. United States*, 1994 A.M.C. 501, 1993 WL 651904 (D. Or. June 21, 1993), at * 3.

If the plaintiff was not a salvor, my research has located no precedent finding an independent duty running from the plaintiff to the defendants under the circumstances of this case. The defendants are not without a remedy for the alleged actions of the plaintiff; if there indeed is no coverage for the loss under the policy, they have alleged that the plaintiff is estopped to deny coverage. If there is coverage, of course, the defendants have not necessarily been injured by the plaintiff's failure to proceed with salvage efforts in the three weeks following the sinking, assuming that such efforts were possible,¹ a disputed factual issue that the court need not resolve in order to decide the motion for summary judgment. On the showing made, I conclude that the plaintiff is entitled to summary judgment on Count IV of the amended counterclaim.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment on Count IV of the amended counterclaim be **GRANTED**.

¹ Cranson's testimony that it is not "my position at this point to salvage that vessel until we have some kind of a combination of this project," Deposition of Michael O. Cranson, submitted with Defendants' SMF, at 123, raises the question whether Cranson actually was unable to proceed with a salvage effort after the plaintiff retired from the field or merely chose not to do so. I note in addition that the defendants' only factual allegations concerning this issue, Defendants' SMF ¶¶ 38-39, are not supported by the record citations, with the exception of Cranson's opinion that the value of the still-submerged vessel at the time of his deposition was \$50,000.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 16th day of August, 2000.

David M. Cohen
United States Magistrate Judge

ACADIA INSURANCE COMPANY
plaintiff

LEONARD W. LANGER
[COR LD NTC]
TOMPKINS, CLOUGH, HIRSHON &
LANGER
THREE CANAL PLAZA
P.O. BOX 15060
PORTLAND, ME 04112-5060
207-874-6700

v.

ALLIED MARINE TRANSPORT LLC
defendant

MICHAEL KAPLAN
791-3115
[COR LD NTC]
PRETI, FLAHERTY, BELIVEAU,
PACHIOS & HALEY, LLC
ONE CITY CENTER
PO BOX 9546
PORTLAND, ME 04112-9546
791-3000